UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MV PUBLIC TRANSPORTATION, INC.

and **Case Nos. 29-CA-29530**
29-CA-29760

JOHN D. RUSSELL, AN INDIVIDUAL

and **Case No. 29-CA-29544**

LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO

and **Case No. 29-CA-29619**

ERIC BAUMWOLL,

and

LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

and **Case No. 29-CB-13981**

JOHN D. RUSSELL, AN INDIVIDUAL

RESPONDENT'S MV PUBLIC TRANSPORTATION, INC.'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondent MV Public Transportation, Inc. ("Respondent") hereby files these Exceptions to the Recommended Decision and Order of the Administrative Law Judge ("ALJ"). Specifically:

1. The ALJ erred in finding that an adverse inference against Respondent was appropriate regarding information contained in payroll records (ALJ Exhibits 1 – 4; General

Counsel Exhibits 30 – 32) that Respondent produced in response to a subpoena duces tecum issued in the above-captioned case. (Page 2 line 33 – Page 3 lines 11)

2. The ALJ erred in finding that information contained in payroll records was deemed accurate as to hiring dates, hours worked, job classifications, and all other information contained in the records. (Page 3 lines 7 – 11)

3. The ALJ erred in finding that Quinto Rapacioli's credibility was diminished merely because he allegedly disavowed the accuracy of information contained in payroll reports that Respondent produced. (Page 2 footnote 2 (lines 46 – 49))

4. The ALJ erred in concluding that all of Respondent's witnesses' testimony was lacking in credibility and to the ALJ's drawing all inferences against Respondent and in favor of the General Counsel, and further to the ALJ's drawing an adverse inference against Respondent's witness merely because she asserted the Fifth Amendment privilege against self-incrimination. (Page 9 footnote 40 (lines 25 – 51))

5. The ALJ erred in finding that the New York City Transit Authority's notice of award and notice to proceed was final and not conditioned upon any other developments, and further to the ALJ's rejecting Respondent's factual evidence that there remained uncertainty over the issuance of future work to Respondent. (Page 5 lines 21-35, including footnote 15 (lines 45 – 48); Page 15 lines 4-11)

6. The ALJ erred in finding that as of September 12, when Respondent voluntarily recognized Teamsters Local 707, Respondent was not engaged in normal business operations because employees allegedly were not yet engaged in the driving portion of the training course, all of Respondent's employees were trainees, none had attained the employment status of driver,

and employees were still in class room training. (Page 6 lines 13 – 15, including footnote 20 (lines 37 – 38); Page 9 lines 7 – 16; Page 16 lines 18 – 27)

7. The ALJ erred in concluding that at the time Respondent voluntarily recognized Teamsters Local 707, Respondent did not employ a representative complement of its projected work force. (Page 14 line 34 – Page 15 line 11)

8. The ALJ erred in concluding that in expanding unit situations, a determination of whether an employer employed a representative complement of its projected work force as of the date of the recognition is based on the complement employed at the time of the hearing challenging voluntary recognition. (Page 14 lines 17 – 25)

9. The ALJ erred in rejecting facts demonstrating that Respondent was uncertain as to the number of employees it would be hiring in the future, and also to the ALJ's finding that there was no evidence casting doubt as to the finality of the Transit Authority's notice of award or notice to proceed. (Page 15 lines 4 – 11)

10. The ALJ erred in finding that neither Respondent nor Teamsters Local 707 informed or notified employees in September 2008 of the voluntary recognition arrangement, and further to the ALJ's finding that Respondent did not post either the recognition agreement, the required notice under Dana Corp., or any other notification about the voluntary recognition, or that employees did not see any of these documents. (Page 9 lines 18 – 22; Page 10 lines 11 – 12; Page 10 footnote 42 (lines 30 – 34); Page 17 lines 31 – 52; Page 19 line 31 – 37)

11. The ALJ erred in finding that employees did not see the recognition agreement or the required notice under Dana Corp. because the drivers' room was allegedly cluttered with papers and the notices would not have been reasonably visible to employees in September 2008. (Page 9 footnote 40 (lines 28 – 29); Page 10 lines 1 – 5; Page 17 lines 31 – 38)

12. The ALJ erred in finding that employees did not become aware of the recognition agreement until October 5. (Page 18 lines 1 – 20; Page 19 lines 31 – 37)

13. The ALJ erred in concluding that Respondent voluntarily recognized and provided unlawful assistance to a labor organization in violation of Sections 8(a)(1), (2), and (3) of the National Labor Relations Act. (Page 16 lines 29 – 34)

14. The ALJ erred in concluding that the six-month limitations period for challenging voluntary recognition does not begin to run until the employer employs a representative complement of its projected work force and, in the alternative, to the ALJ's conclusion that the six-month limitations period did not begin to run until the employees were informed of the voluntary recognition agreement on October 5, 2009. (Page 19 lines 19 – 29; Page 19 lines 31 – 37)

15. The ALJ erred in concluding that Section 10(b) of the Act did not bar the above-captioned unfair labor practice charges challenging Respondent's voluntary recognition of Teamsters Local 707 and alleging unlawful assistance. (Page 17 lines 31 – 52; Page 18 line 46 – Page 19 line 37)

In addition, Respondent hereby adopts and joins in any and all Exceptions raised and put forward by Teamsters Local 707 in this matter.

LITTLER MENDELSON
H. TOR CHRISTENSEN
1150 17th Street, NW, Suite 900
Washington, D.C. 20036
(202) 842-3400

Attorneys for Respondent
MV PUBLIC TRANSPORTATION, INC.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MV PUBLIC TRANSPORTATION, INC.		
and	**Case Nos.**	**29-CA-29530** **29-CA-29760**
JOHN D. RUSSELL, AN INDIVIDUAL		
and	**Case No.**	**29-CA-29544**
LOCAL 1181-1061, AMALGAMATED TRANSIT UNION, AFL-CIO		
and	**Case No.**	**29-CA-29619**
ERIC BAUMWOLL,		
and		
LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS		
LOCAL 707, INTERNATIONAL BROTHERHOOD OF TEAMSTERS		
and	**Case No.**	**29-CB-13981**
JOHN D. RUSSELL, AN INDIVIDUAL		

RESPONDENT MV PUBLIC TRANSPORTATION, INC.'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondent MV Public Transportation, Inc. ("Respondent" or "MV") submits this brief in support of its exceptions to the June 7, 2010 Decision and Recommended Order ("Decision") of Administrative Law Judge Michael A. Rosas ("ALJ").

The ALJ's Decision is erroneous in several respects. As discussed below, the ALJ ignored relevant evidence, drew improper inferences from undisputed testimony, and misapplied Board law to conclude, incorrectly, that MV violated the National Labor Relations Act (the "Act) by voluntarily recognizing and providing unlawful assistance to Local 707, International Brotherhood of Teamsters ("Local 707"). In fact, the ALJ's decision is a results-oriented decision based exclusively on biased and partial reasoning, and is entirely unwarranted by the record evidence in this case. Rather than evaluate the testimony and documentary evidence in a fair and impartial manner, the ALJ uniformly and unjustifiably found that the General Counsel's witnesses were credible and that MV's and Local 707's witnesses were not worthy of belief. Indeed, for the ALJ to do otherwise necessarily would have required him to reach different conclusions in this case. Accordingly, the Board should sustain MV's exceptions and reverse the ALJ's Decision.

I. STATEMENT OF FACTS

MV provides paratransit services to a monthly average of 26,000 passengers in the borough of Staten Island under contract with the New York City Metropolitan Transportation Authority ("Transit Authority"). These paratransit services allow Respondent's passengers to attend medical appointments, maintain employment and participate in recreational activities. MV operates only those routes that are assigned to it by the Transit Authority, and only so long as the Transit Authority does not assign them to another operator, which it can do at any time. Tr. 402; 404.[1]

---

[1] References to the Transcript of testimony in this matter will be noted as "Tr." and followed by the appropriate page numbers.

A. MV Voluntarily Recognizes Local 707

On August 28, 2008, MV and Local 707 entered into a Card Check and Neutrality Agreement ("Agreement") for MV's Staten Island employees. Joint Exhibit ("Jt. Ex.") 3. In that Agreement, MV agreed to recognize Local 707 "upon a showing by the Union that it represents a majority of employees in the appropriate bargaining unit ..." Id. at ¶ 3; Tr. 417.

On September 8, 2008, Local 707 President Kevin McCaffrey notified MV that Local 707 represented a majority of the bargaining unit employees. General Counsel Exhibit ("G.C. Ex.") 19; Tr. 418. In keeping with the procedures that the Agreement established, the parties asked a neutral arbitrator, Elliott Shriftman, to verify the cards and conduct a card check. Shriftman conducted the card check on September 11, 2008. At the conclusion of the card check, Shriftman certified that Local 707 did in fact represent a majority of the bargaining unit employees. G.C. Ex. 8-b; Tr. 418-419. The next day, Local 707 and MV executed a Recognition Agreement in which MV recognized Local 707 as the exclusive bargaining representative of MV's employees. Jt. Ex. 2; Tr. 418.

At the time that MV voluntarily recognized Local 707, the amount of work it anticipated receiving from the Transit Authority was uncertain. Indeed, the General Manager for the Employer, Quinto Rapacioli, testified without contradiction that at the time of recognition, MV was completely unaware of the number of routes or vehicles that would be assigned to it. Tr. 398. In fact, MV's witnesses credibly testified that it was not armed with any of this information until, at the earliest, December 2008. Tr. 398. Rather, at the time of recognition, one of MV's competitors, RJR, was continuing to provide paratransit services on Staten Island, and had previously been assigned the majority of the routes on Staten Island under a prior contract with the NYCTA. Tr. 397; 407. In fact, during this time, RJR was operating approximately 97 buses

on Staten Island, ***and*** the Transit Authority had not announced whether this competitor would have its contract renewed or not. Tr. 397-398; 407.

There is no evidence of any guarantee that the Transit Authority would not renew its contract with RJR, and neither the General Counsel nor any of the Charging Parties presented any evidence or testimony to suggest otherwise. Rather, the undisputed evidence is that the Transit Authority had sole discretion as to who would be assigned routes, and assigned vehicles at its sole discretion. Tr. 402. Nor is there anything in MV's contract with the City of New York that requires the Transit Authority to assign any vehicles or routes whatsoever to MV. Tr. 404. The 'Ramp Up' document referred to by the ALJ in his decision represented a guarantee by MV that it could service that number of routes – not a guarantee that those routes would be assigned by the Transit Authority.

Shortly after Arbitrator Shriftman conducted the card check, the parties notified the Regional Director of Region 29 of the voluntary recognition pursuant to the Board's holding in Dana Corp., 351 NLRB 434 (2007). In a letter dated September 18, 2008, the Regional Director confirmed receipt of the notice of voluntary recognition (Case No. 29-VR-13), and asked MV to provide additional information. G.C. Ex. 13.

MV and Local 707 posted several documents in the Drivers' Room at MV's facility at 40 LaSalle Street in order to ensure that employees were informed about the status of the recognition proceedings. For example, in September 2008, MV posted copies of Arbitrator Shriftman's certification of the card check and the Recognition Agreement in the Drivers' Room. G.C. Ex. 8-b; Tr. 421-422; 427. One of MV's Dispatch Managers, Anthony Ranieri, testified without contradiction that he saw Arbitrator Shriftman's certification of the card check posted in the Drivers' Room during this time period. Tr. 519. In addition, during the week of September

20, 2008, MV also posted in the Drivers' Room a copy of the Regional Director's letter confirming receipt of the notice of voluntary recognition. Tr. 547-550.

Further, during September 2008, one of Local 707's business agents, Danny Pacheco, spoke with employees about the voluntary recognition process and asked them to start thinking about proposals that employees believed Local 707 should present to MV during upcoming negotiations for a new collective bargaining agreement. Tr. 550-552. Finally, one of MV's drivers, Maria del Valle Osman, testified that during the month of September 2008, she saw Arbitrator Shriftman's certification of card check and the Regional Director's confirmation letter posted in the Drivers' Room.[2] Tr. 584-585.

After the 45-day posting period under Dana Corp. expired, the parties negotiated a Collective Bargaining Agreement, which was ratified on December 11, 2008 and became effective the next day. Employer Exhibit ("Er. Ex.") 7; Jt. Ex. 1.

B. The Unfair Labor Practice Charges

On or about March 31, 2009, John D. Russell ("Charging Party Russell") filed an unfair labor practice charge (29-CA-29530) alleging, among other things, that MV had "unlawfully recognized Local 707, International Brotherhood of Teamsters (the Union) as the collective bargaining representative of its drivers, mechanics and utility workers employed out of the 900 South Avenue, Staten Island, New York, and entered into a collective bargaining agreement covering those employees." The charge similarly alleged that Respondent provided Local 707 with unlawful assistance and required employees as a condition of employment to sign union

---

[2] The ALJ impermissibly drew an adverse inference against Ms. Osman's credibility merely because she initially asserted the Fifth Amendment privilege against self-incrimination. That Ms. Osman ultimately waived the privileged and testified truthfully and honestly demonstrates that an adverse inference was completely unwarranted and further demonstrates the ALJ's bias in the instant case.

membership cards at a time when the Union did not represent a majority of the drivers, utility workers and mechanics. A few days later, the Amalgamated Transit Union, Local 1181-1061 ("Local 1181") filed a similar unfair labor practice charge (29-CA-29544), which was later dismissed by the Regional Director. Over the course of the next few months, a series of other related unfair labor practice charges were filed. These charges included:

- 29-CB-13981 on March 31, 2009, which alleged that Local 707 unlawfully accepted assistance and recognition MV.
- 29-CA-29760 in early August 2009, which alleged that MV's General Manager directed employees not to discuss Local 1181 while at work.
- 29-CA-29619 on May 22, 2009, which alleged that an employee was discharged in retaliation for his refusal to support Local 707, in addition to an array of other allegations (some, but not all, of these charges were dismissed).

These charges were combined in a Consolidated Complaint (the "Complaint"), and a hearing was held before Administrative Law Judge Rosas, on December 8, 9, 10, 11, 16 and 17 2009 and January 19, 2010.

II. SPECIFICATION OF THE ISSUES RAISED BY RESPONDENT'S EXCEPTIONS

1. Is the ALJ's determination that MV unlawfully recognized and provided voluntary assistance to Local 707 supported by the evidence and applicable law? (Exceptions 1, 2, 3, 4, 5, 6, 7, 8, and 9).

2. Is the ALJ's determination that Charging Party Russell's unfair labor practice charge in Case No. 29-CA-29530 is not time-barred under Section 10(b) of the Act supported by the evidence and applicable law? (Exceptions 10, 11, 12, 13, 14, and 15).

III. ARGUMENT

A. The Voluntary Recognition Did Not Violate The Act And MV Did Not Provide Unlawful Assistance To Local 707 [Exception Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 9]

The ALJ erred in concluding that MV unlawfully recognized Local 707 because at the time of recognition, MV employed a representative complement of its workforce and it was engaged in normal business operations.[3] Under the standard set forth in New Concept Solutions, 349 NLRB 1162 (2007): "At the time of recognition (1) an employer must employ a substantial and representative complement of its ***projected*** work force, that is, the jobs or job classifications designated for the operation must be substantially filled and (2) the employer must be engaged in normal business operations." (emphasis added). Both prongs of the standard are satisfied here.

At the time of the card check, MV employed 22 bargaining unit employees. G.C. Ex. 8-b. Although the number of bargaining unit employees increased, there is no record evidence to suggest that this unanticipated growth should negate an otherwise valid and lawful recognition agreement. In addition, there is no evidence that MV did not employ a representative complement of employees at the time of recognition nor is there any evidence that MV was not engaged in regular business operations at the time of recognition. As discussed above, Rapacioli testified without contradiction that at the time of recognition, MV was completely unaware of the number of routes or vehicles that would be assigned to it, and was not armed with any of this information until, at the earliest, December 2008. Tr. 398. At the time of recognition, MV's competitor was operating 97 buses on Staten Island, and was actively seeking to renew its contract with the Transit Authority. Tr. 397; 407. It was not until December 2008 that Rapacioli

---

[3] In determining the legality of MV's and Local 707's voluntary recognition agreement and considering the allegation of unlawful assistance, the ALJ did not consider whether MV complied with the posting requirements set forth in Dana Corp., 351 NLRB 434 (2007).

became certain the Transit Authority had elected not to renew its contract with RJR. TR. 398. If the contract with RJR had been renewed, which was entirely possible at that time, MV would have been left with approximately 20 or 30 buses, at most. Tr. 411.

The Transit Authority had sole discretion to decide which of 17 carriers in the New York City area would receive routes, and it assigned routes consistent with that discretion. Tr. 402. When MV recognized Local 707, the Transit Authority had not announced whether MV's competitor would continue to operate these routes. In fact, the Transit Authority is not even required to follow the ramp-up schedule in a contract. G.C. Ex. 20; Tr. 402. Despite what the contract says, it is undisputed that the Transit Authority could remove buses and routes from one carrier and give them to another carrier. Tr. 404. There is no record evidence that MV was guaranteed a certain number of routes or buses at any given time, particularly in September 2008. Tr. 404.

The ALJ rejected all of this testimony along with the absence of any guarantees in the contract with the Transit Authority, stating instead that "there was no credible evidence even suggesting that the notice of award/notice to proceed issued by the Transit Authority ... was anything other than final." Decision at 5 fn. 15. It was completely inappropriate for the ALJ to resolve this testimony against MV by claiming that it "attempted to inject uncertainty as to the award based on letters to a local newspaper urging support for the prior service provider." Id. Unless and until an announcement was made with respect to RJR's contract with the Transit Authority, which did not occur until December 2008, it was inappropriate for the ALJ to speculate that the number of routes would have increased. Indeed, if the Transit Authority had renewed the contract with RJR, the number of routes that MV operated would not have exceeded 30 routes. Thus, when Local 707 presented the 22 authorization cards to MV, the parties had a

good faith basis for believing that there existed a representative complement of employees. It was appropriate for MV to recognize Local 707 at that time.

Further, at the time of recognition, MV was engaged in full scale training and preparation, which involved driving the same vehicles in the same locations as when routes began to be assigned. See Klein's Golden Manor, 214 NLRB 807 (1974) (full scale training and preparation can constitute 'normal business operations'). See also Elmhurst Care Center, 345 NLRB 1176, 1180 (2005) (dissent of Member Liebman). By employing bargaining unit employees, training them to service their customers, and allowing them to drive their vehicles, there is no dispute that MV was engaged in its normal business operations.

In sum, noticeably absent from the record is any evidence that the Transit Authority had any intention of cancelling its contract with RJR, assigning any specific number or range of routes and vehicles to MV, or that there was any certainty that MV believed that the number of its routes would increase to more than the 20 to 30 routes it anticipated operating. The General Counsel and the Charging Parties utterly failed to contradict MV's credible evidence on these points. Rather, the ALJ, in a biased and impartial attempt at achieving the result that he desired, immediately stated from the outset that Rapacioli's testimony "was necessarily diminished" merely because he allegedly disavowed the veracity of dates of hire included in certain payroll information MV produced to the General Counsel. However, the ALJ's premature decision to discredit all of Rapacioli's testimony is based solely on the ALJ's distorted reading of the record on this particular issue. Specifically:

The General Counsel sought to introduce the payroll records produced by MV into the record, without any testimony as to whether the hire dates were accurate or the source of this information. Tr. 349 – 354; 357. In its subpoena, the General Counsel specifically requested

payroll records, which were produced. Tr. 697-9. The General Counsel separately requested information showing the hiring dates of the employees, to which MV provided several sets of records. Id. MV did not produce the payroll records as responsive to the request for hiring dates, as the hiring dates in the payroll records were inaccurate. Id. The General Counsel called Quinto Rapacioli as a witness, used him to introduce the payroll records into evidence, and never questioned Mr. Rapacioli regarding the accuracy of any part of the information in these records. Tr. 349-354, 357. On cross-examination, Mr. Rapacioli simply testified that some of the hiring dates in the payroll records were inaccurate – not that the remainder of the data contained in these records was inaccurate. Tr. 446-8. It is further undisputed that MV produced numerous responsive documents, including one which shows each and every day worked by every employee during the relevant time, which had been described as the 1,716 page daily employment record, in addition to agreeing to stipulate to a set of records showing hiring dates for its employees, based upon various sets of data including the best recollection of Mr. Rapacioli. Tr. 697-8; 762-767. There is nothing in this exchange to suggest that Rapacioli disavowed the veracity of the majority of the information contained in the payroll records – or the payroll records themselves. It was error for the ALJ to discredit Rapacioli so early in the case based on this testimony. The reality is that MV employed a representative complement and was engaged in normal business operations at the time it recognized Local 707. The ALJ's unsupported and partial conclusions to the contrary should be set aside.

B. The ALJ Erred In Failing To Conclude That The Charges Are Time-Barred Under Section 10(b) Of The Act [Exception Nos. 10, 11, 12, 13, 14, and 15]

Section 10(b) of the Act states "[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof on the person against whom such charge is made, unless the person

aggrieved hereby was prevented from filing such charge by reason of service in the armed forces ..." 29 U.S.C. § 160(b). Thus, Section 10(b) creates a two-part test for determining whether a charge has been timely filed. First, the charge must be filed within six months of the commission of the alleged unfair labor practice. Second, the charge must have been served on the charged party within six months of the alleged unfair labor practice charge. Neither event occurred here.

Local 708 and MV entered into the Recognition Agreement on September 12, 2008. Russell began working for MV in October 2008. However, he did not file the above-captioned charge until March 31, 2009, and it was not served until April 2, 2009. Neither of those dates fall within the six-month period following execution of the Recognition Agreement on September 12. Rather, to be timely, Russell was required to file and serve the charge no later than March 12, 2009, which is within six months of September 12, 2008.

In Local Lodge No. 1424 v. NLRB (Bryan Mfg.), 362 U.S. 411, 423 (1960), the United States Supreme Court established a standard for the Board to follow when considering allegations of unlawful recognition. Specifically, "the circumstances which cause the agreement to be invalid existed only at the point in time in the past when the agreement was executed, and are not thereafter repeated. For this reason, therefore, the continuing invalidity of the agreement is directly related to and is based solely on its initial invalidity, and has no continuing independent basis." That there can be no valid claim that the allegedly unlawful recognition created a continuing violation under the Act demonstrates that the Section 10(b) limitations period should be measured from the date of recognition.

There is no evidence that either Local 707 or MV concealed the existence of the Recognition Agreement from bargaining unit employees. Rather, the undisputed evidence

demonstrates that immediately after recognition, and continuing through the Dana posting period, MV and Local 707 were completely open and forthright about the status of the recognition proceedings and negotiations for a first contract. In fact, Russell testified that he knew about the existence of Local 707 on his first day of employment in October 2008.

Danny Pacheco credibly testified that he posted Arbitrator Shriftman's certification and the Recognition Agreement in the Drivers' Room on or about September 15, 2008, and that he immediately began discussing the voluntary recognition with employees. Tellingly, the fact that Mr. Pacheco immediately discussed the recognition with all the employees he saw was never discredited by the ALJ – only ignored. Accordingly, the latest that the statute of limitations could have commenced running was September 15, 2008, which would mean that a charge would have to have been filed and served no later than March 15, 2008. Even if the Board were to conclude that the limitations period began to run on September 15, the above-captioned charge remains untimely. See R.J.E. Leasing Corp., 262 NLRB 373 (1982) (Board held that the limitations period under Section 10(b) began to run when employees became aware of the allegedly illegal acts); Texas World Serv. Co. v. NLRB, 928 F.2d 1426 (5th Cir. 1991). Indeed, the Board has held that an employee's statute of limitations begins to run when "at least one statutory employee was hired or otherwise had notice of the employer's illegal actions." NLRB v. Triple C. Maintenance, Inc., 219 F.3d 1147 (10th Cir. 2000) citing Texas World Serv. Co. v. NLRB, 928 F.2d 1426, 1437 (5th Cir. 1991) (holding that the Section 10(b) period began to run when "charges first could have been brought based upon when the employer first hired employees").

In addition, copies of the arbitrator's certification of card check, the Recognition Agreement, and the Regional Director's confirmation of receipt of the Dana notice were posted

in the Drivers' Room in September 2008. MV also posted a copy of the Dana notice and the Regional Director's accompanying correspondence. In addition, several employees testified that they were fully aware that MV voluntarily recognized Local 707 in September 2008. Specifically:

- Maria del Valle-Osman testified that she was immediately aware of the recognition in the early part of September 2008. Tr. 583:14-23.
- Nilda Muniz testified that she became aware of the voluntary recognition during her first week of employment with MV. Tr. 229:15-17; 230:13-15.
- Stephen Rebracca testified that he signed an authorization card and knew that a voluntary recognition agreement was imminent. Tr. 207:18-208:2.

In order to achieve the result he desired in this case, which is to disturb a valid and lawful peaceful recognition agreement between MV and Local 707, the ALJ's only option was to find some reason to discredit each and every witness who testified in favor of MV and Local 707, and to believe every witness that the General Counsel presented. Decision at 9 fn. 40. As noted above, it was improper for the ALJ to draw an adverse inference against Valle-Osman merely because she initially asserted, but eventually waived, the Fifth Amendment privilege against self incrimination. In addition, and also as discussed above, the ALJ erred in drawing an adverse inference against Rapacioli merely because the ALJ believed, albeit falsely, that Rapacioli disavowed the veracity of information produced to the Counsel for the General Counsel. In reality, Rapacioli did no such thing. Rather, Counsel for the General Counsel sought to introduce payroll records to show the hiring dates of MV's employees, when MV never represented that these records were appropriate for that purpose, and had produced several sets of documents which were in fact accurate for that purpose, which the ALJ improperly viewed as an

attempt to disavow the truth of the information. Adverse inferences against Valle-Osman and Rapacioli were simply not warranted.

In rejecting the testimony of one of Local 707's business agents, the ALJ states that "Pacheco testified that he posted the certification after the September 12 recognition agreement was entered into, but failed to provide the names of persons with whom he spoke." Id. There is no connection between Pacheco's statement that he posted the recognition agreement in mid-September 2008 and his inability to recall the names of people with whom he may or may not have conversed. Moreover, that Local 707's position statement, which was not written by Pacheco, does not refer to a document that Pacheco specifically recalls posting say nothing about whether Pacheco did, in fact, post the recognition agreement as he credibly testified.

There is no rationale under Section 10(b) which provides that new employees are given a new six month statute of limitations under Section 10(b) when they are hired. In fact, no case exists where a separate statute of limitations was provided to employees hired more than six months after the date of the recognition. There also is no legal support for the ALJ's determination that the limitations period did not begin to run until a representative complement of the workforce existed. Rather, if MV allegedly unlawfully recognized Local 707 at a time that it allegedly did not employ a representative complement in September 2008, then that is the date on which the alleged unlawful act occurred. See Bryan Mfg., 362 U.S. at 423 ("the continuing invalidity of the agreement is ***directly related to and is based solely on its initial invalidity*** . . .") (emphasis added).

It defies logic for the ALJ to say on the one hand that MV violated the Act in mid-September 2008 because it recognized Local 707 at a time when it allegedly did not employ a representative complement, but then say on the other hand that the limitations period does not

begin to run until a representative complement allegedly existed, which is long after the alleged unlawful act. Section 10(b) expressly states that a complaint shall not issue "based upon any ***unfair labor practice occurring more than six months prior to the filing of the charge*** . . ." 29 U.S.C. § 160(b). The ALJ concluded that Respondent committed an unfair labor practice on September 12, 2008 when it voluntarily recognized Local 707. Consistent with Section 10(b) and the Supreme Court's holding in Bryan Mfg., the date on which the limitations period began to run was on that date. Accordingly, the ALJ erred and his decision should be set aside.

In sum, the argument that a new employee could not have known of the alleged unfair labor practice or unlawful recognition is true in every case where the union and the employer do not personally inform every possible future employee of the recognition. To accept the ALJ's holding could lead to a situation where a new employee hired several years after recognition could file an unfair labor practice charge challenging the recognition, years or even decades, after the bargaining relationship was established. Other unfair labor practice charges outside the context of voluntary recognition could be filed at any time, so long as they are filed no more than six months from the time the charging party was hired. For there to be any industrial stability or labor peace, and for Section 10(b) of the Act to have any meaning, the time to file a charge begins to run when any employee has notice of their claim, and not when each individual employee learns of a possible claim. Because the undisputed evidence demonstrates that MV's employees were aware of the voluntary recognition, whether they learned about it by seeing a posting in the Drivers' Room or by verbal notification from Teamsters 707's business representative, Pacheco, there is no question that the charges are time-barred.

IV. CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Board reverse the ALJ's Decision and dismiss the Complaint in its entirety.

LITTLER MENDELSON
A Professional Corporation
H. TOR CHRISTENSEN
JENNIFER L. MORA
1150 17th Street, NW
Suite 900
Washington, D.C. 20036
(202) 842-3400

Attorneys for Respondent
MV PUBLIC TRANSPORTATION, INC.

AFFIDAVIT OF SERVICE

I hereby certify that I have this 20th day of July 2010 caused the foregoing Exceptions to the Decision of Administrative Law Judge Michael Rosas to be served electronically via the NLRB's e-filing system and further certify that I have caused copies of the foregoing document to be served via electronic mail on the following:

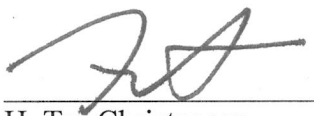
George Kirschenbaum, Esq.
Cary Kane, LLP
1350 Broadway, Suite 815
New York, NY 10018
Counsel for IBT Local 707
gkirschenbaum@carykane.com

Richard A. Brook, Esq.
Meyer, Suozzi, English & Klein
1350 Broadway
New York, NY 10018
rbrook@msek.com

Nancy Lipin, Esq.
Region 29, National Labor Relations Board
Two Metro Tech Center
100 Myrtle Avenue, 5th Floor
Brooklyn, NY 11201-4201
Nancy.lipin@nlrb.gov

John D. Russell
667 Quincy Avenue
Staten Island, NY 10305
Kmf1313@gmail.com

Eric Baumwoll
63 Ebony Street
Staten Island, NY 10306
easyenyc@msn.com



H. Tor Christensen

Firmwide:96098528.2 053320.1036